United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued by WILLIAM SONENSHINE, ESQ

74-1972

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1972

ORIGINAL

UNITED STATES OF AMERICA,

Appellee,

-against-

VITO DIBARTOLO,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

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BRIEF IN BEHALF OF APPELLANT

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STATEMENT OF THE CASE

Appellant. VITO DIBARTOLO, was indicted in the United States District Court in the Eastern District of New York under Indictment Number 71CR1364 and charged with thirteen counts of Possession and Forgery of Checks stolen from the United States mail in violation of Title 18 United States Code Section 1708.

On February 11, 1974 the appellant pled guilty to the seventh count of the indictment before Judge John F. Dooling. On April 16, 1974 the appellant was sentenced to a term of imprisonment of two (2) years at which time all other counts in the indictment were dismissed.

On June 14, 1974 pursuant to a motion filed on May 21, 1974 for an order setting aside the sentence and permitting the withdrawal of the guilty plea a hearing was conducted before Judge John F. Dooling to determine whether or not said motion should be granted. Thereafter on June 21. 1974 Judge John F. Dooling denied said motion, granted permission to appeal and stayed execution of the sentence pending the appeal releasing the appellant on a $5.000.00 appearance bond secured by a deposit of $500.00.

A Notice of Appeal was duly filed on June 21, 1974.

STATEMENT OF FACTS

The pertinent facts relating to the Appellant, are set forth within the body of the brief and, accordingly, are not reiterated herein.

POINT ONE

IT WAS ERROR FOR THE COURT TO DENY THE APPELLANT'S MOTION TO VACATE HIS SENTENCE AND WITHDRAW HIS GUILTY PLEA

A hearing was conducted on June 14, 1974; before Judge John Dooling, pursuant to a motion brought by the appellant to have his sentence vacated and his guilty plea withdrawn; said motion was denied. The basis for the motion was the inability of the appellant to fully understand the nature and consequences of the charge or properly state facts sufficient to warrant the courts acceptance of the plea, because of a language problem, which was compounded by the use of his attorney as an interpreter rather than the court having an official court interpreter present.

The appellant, on February 11, 1974, entered a plea of guilty to Title 18 U. S. Code, Section 1708, under indictment number 71 CR 1364. At the time of the plea, counsel for the appellant, acted as an unofficial interpreter and attempted to explain the appellant's participation in the crime charged.

The count that the appellant was pleading to, specifically charged that he unlawfully possessed a stolen United States Treasury check, which was taken from the mail and that he knew it was stolen.*(P 3; A-3)

*Numerical references when preceded by the letter P-refer to pagesof the plea, when preceded by the letter H-refer to pages of the hearing and, when preceded by the letter A- they refer to appellant's Appendix to Brief.

A reading of the plea minutes, indicates that the appellant was not able to effectively communicate in English and, that his attorney had to explain the court's comments to him and then translate the appellant's comments to the court.

The court, at no time during the plea, questioned the appellant concerning his ability to understand English, whether he would need an interpreter or whether he was able to completely understand and communicate with his attorney, who was attempting to interpret for him. The failure of the court to determine prior to the plea or during it, whether or not an official interpreter was required, prejudiced the appellant and permitted a plea to a count for which his guilt was never intelligently established.

Although, it is recognized that the appointment of an interpreter lies within the discretion of the Court, (Perovich v. United States, 205, U.S. 86, 91 27 S.Ct. 456, 51 L.Ed. 722 [1907]), it is submitted that the court totally ignored the problem in this case.

The question of the appellant's knowledge that the check was stolen, had to be proven to the court to satisfy the elements of the charge so that it could accept the plea. It was incumbant upon the court to determine the extent of the appellant's ability to understand the court and his counsel in determining whether or not to accept the plea.

In United States v. Carrion, 488 F. 2d 12, the court stated at page 14 that:

" If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses. The right to an interpreter rests most fundamentally, however on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."

The Court continued at page 15 stating:

" But precisely because the trial court is entrusted with discretion, it should make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court appointed interpreter if the court determines that one is needed, and, whenever put on notice that there may be some significant langauge difficulty, the court should make such a determination of need."
(emphasis added)

The court at the time of the plea was put on notice that the

appellant had a language problem almost immediately because of the appellant's use of broken English and then his attorney's intervention explaining the facts for him. (P 3-5; A - 3 A-5) At that time the court should have inquired as to the need for an interpreter, but chose not to.

The problem that was taking place during the plea was emphasized during a hearing conducted pursuant to appellant's motion to withdraw his plea. At the hearing, appellant's attorney, who interpreted for him at the plea, indicated that he attributed the requisite knowledge that the check was stolen,to the appellant, because the appellant told him he paid the individual who gave him the check a portion of its face value and that he believed the man would not come back or that the man did not come back. The attorney was not able to determine whether the appellant was talking about when he took the check, or at a later time, he determined that the man would not come back (H16-23; A- 26-33).

It is evident that there was lacking at the time of the plea a complete understanding of the appellant's knowledge at the time of the transaction, because of the inablility of counsel to adequately interpret the appellant's statements.

> "....The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."
> (Federal Rules of Criminal Procedure, Rule 11)

Immediately upon being apprised of the charge by the court the appellant stated that "I don't say I stole it or not" (P 4, A- 4), followed by:

"THE COURT: Did you have that check, that's what we are talking about; what they charge is that you had the check.

MR. TOMASELLI: His interpretation is as follows. He had the check in his possession. I just reiterated it in Italian what the situation was. He said he had the check in his possession. He knew the check wasn't 100 percent good. This is his words to me -- however, he did not actually know that it was stolen. In other words, he didn't see anybody steal it but he knew that the check was not a bona fide check.

THE COURT: You knew that the man who gave it to you wasn't Mr. Carponeta?

MR. TOMASELLI: Tell the Judge.

MR. DIBARTOLO: Yes.

THE COURT: And you strongly suspected that it had been stolen?

MR. DIBARTOLO: Yes, I know it was something.

THE COURT: In other words, the circumstances

"in which you received the check made you understand that something was wrong with it?

MR. TOMASELLI: He says the individual brought it in, didn't tell him but he understood there was something wrong with the check.

THE COURT: You could tell from what he wanted for it, right?

MR. DIBARTOLO: Yes.

THE COURT: In other words, he didn't expect to get from you the whole face amount of the check?

MR. TOMASELLI: He said he told the individual he couldn't give him all the money. He gave him a portion, that he left and he knew he wouldn't be back.

THE COURT: All right. I think that's enough to convince a jury that you knew it was stolen."

It is apparent from the above that the appellant never admitted that he knew that the check in question was stolen. The court determined that because the appellant admitted paying less than face value and because his attorney acting as interpreter stated that the appellant knew the man would not be back was sufficient to convince a jury that he knew the check was stolen. (P5:A-5) The only admission by the appellant was that he knew it was something" referring to the check when questioned

whether he knew it was stolen. (P4; A-4)

The Advisory Committee's Notes to Rule 11 explain that:

> "The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty."

In the instant case there was no presentence report or inquiry of the government's attorney, there was only an inquiry of the appellant, whose responses failed to satisfactorily show the requisite mens rea required under the statute.

Considering the inability of the appellant to adequately show a sufficient factual basis for the acceptance of the plea along with hisfailure to fully understand the consequences of the plea, the court should not have accepted it.

The Court in explaining the consequences of the plea to the appellant, informed him that he could not appeal from the sentence, " it's just as if you had gone to trial on Count Seven and lost the appeal;

do you understand that?" (P 7; A -7). This was followed by :

"MR. DIBARTOLO: Excuse me. One Question.

MR. TOMASELLI: He understands that, Judge."

Obviously, the appellant was disturbed by the statement of the court and sought clarification, but before he could ask his question, his counsel interrupted stating that he understood. The court at this point should have questioned the appellant concerning his understanding, but instead continued on.

In McCarthy v. United States (1969) 394 U. S. 459, 89 S. Ct. 1166, 221 L. Ed. 2d 418, the United States Supreme Court ruled that complete compliance with the requirements of Rule 11 is mandatory stating:

> " We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but will also help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are en-

"couraged and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and determine whether they understand the action they are taking."

CONCLUSION

THE SENTENCE SHOULD BE SET ASIDE AND THE PLEA VACATED

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Appellant

WILLIAM SONENSHINE, ESQ.
Of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
)ss.:
COUNTY OF KINGS)

Marie Miller, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York. That on the 15th day of August, 1974 deponent served the within brief (three copies thereof) upon the Hon. David G. Trager, United States Attorney in this action at 225 Cadman Plaza East, Brooklyn, New York by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me this
15th day of August, 1974

LEWIS D. COHEN
Notary Public State of New York
No. 24-5472660 Qual. in Kings County
Commission Expires March 30, 1976

Marie Miller